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In the Supreme Court of the United States

October Term 1964

No. 987

THE MOTOR CONVOY, INC., AND NATIONAL TRUCKING COMPANY,

Appellants,

versus

THE UNITED STATES OF AMERICA and THE INTERSTATE COMMERCE COMMISSION

Appellees

On Appeal from the United States District Court for the Northern District of Georgia, Atlanta Division

MOTION TO AFFIRM

Pursuant to Rule 16, paragraph 1(c), of the Revised Rules of this Court, the intervening appellee, Dixie Transport Company, moves that the judgment of the District Court be affirmed.

STATEMENT

This is a direct appeal from a final judgment (J.S. 10a) of a three-judge District Court convened pursuant to 28 U.S.C. 2284 and 2325. Appellants' action below was brought to set aside an Order of the Interstate Commerce Commission[1] which granted the petition of Dixie Transport Com-

[1] *Docket No. MC-88300, Dixie Transport Company, Petition for Modification of Certificate*, October 15, 1963. (Unreported)

pany[2] for modification of its common carrier certificate authorizing the interstate transportation of automobiles. The sole effect of the modification is to prevent Dixie from being wholly deprived of its automobile traffic from Detroit to Georgia and Florida, previously transported by it in all-motor movements, which now moves partly by motor carrier and partly by rail.

Since the inception of federal motor carrier regulation, the Commission has issued certificates authorizing the transportation of automobiles either in "initial movements" or "secondary movements." "Initial movements" are defined as movements of automobiles from manufacturing and assembly plants to destination, while "secondary movements" encompass all other automobiles movements, such as used, damaged or repossessed automobiles, or new automobiles moving from places other than manufacturing and assembly plants (J.S. 1a-2a). This phraseology resulted in unforeseen problems when applied to the coordinated motor-rail service resulting from the advent of TOFC and MLRC.

With the advent, in recent years, of trailer on flat car (TAFC) and multi-level rail cars,[3] Dixie Transport Company, as well as many other automobile motor carriers, suffered extensive loss of traffic which it previously enjoyed.

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[2] Dixie's Petition was filed pursuant to the procedures previously established by the Commission in *National Automobile Transporters' Association, Petition for Declaratory Order*, 91 M.C.C. 395.

[3] In TOFC service, a demountable highway trailer is placed aboard a railroad flatcar for a portion of the line haul movement, the complete journey from origin to destination being accomplished partly by motor carrier and partly by rail. In movement by multilevel rail car (a railroad flatcar, equipped with bilevel or trilevel racks, specially designed for the carriage of automobiles), the automobiles ordinarily move by motor carrier to and/or from the origin and destination railroads, and by rail for the line-haul movement.

In *National Automobile Transporters' Association, Petition for Declaratory Order*, hereinafter referred to as NATA, 91 MCC 395, the Commission, after conducting extensive hearings, in which the appellants herein participated, concluded that certain motor carriers would, if specified criteria were met, be entitled to modification of their certificates of authority, which would afford such carriers an opportunity to continue to participate in traffic in those instances where authority would not cover the movement. The NATA decision further specified that if an existing authority were modified a petitioner will not be required to relinquish presently held authority, but at the same time the change in existing rights will be limited so as not to place such a petitioner in a position to infringe on the operation of existing carriers.

Pursuant to the procedures set forth in the NATA decision, Dixie Transport Company filed a petition for modification and indicated therein that in 1960, prior to the advent of TOFC and MLRC service, it transported 19,263 automobiles from the Chrysler plants in Detroit to destinations in Florida and Georgia resulting in revenues of $2,959,536.72 (Pet. ex 1). It was demonstrated, by comparing Exhibits I and II of the Dixie Petition, that in 1960 this Chrysler traffic from Detroit amounted to approximately 70% of Dixie's total gross revenue. In 1961, however, Chrysler began to utilize the MLRC service from Detroit to Atlanta, Georgia and Jacksonville and Miami, Florida, with a motor movement only from those railheads to destinations in Georgia and Florida. Since its "initial authority" did not authorize it to perform that remaining motor movement, Dixie had, by October, 1961, lost all of its Chrysler traffic. Dixie, thus, sought a modification of its certificate to enable it to perform the remaining motor

movement of its former Chrysler traffic from Atlanta, Jacksonville and Miami to destinations in Georgia and Florida.

Appellants filed protests and requests for oral hearing, but did not deny the facts set forth by Dixie in its petition and affidavit. The Commission denied the request for oral hearing and modified Dixie's certificate so as to authorize it to transport automobiles in "secondary movements" from the three destination railheads to points in Georgia and Florida, "restricted to traffic originating at Chrysler Corporation plants in Detroit, Mich., and having an immediate prior movement by rail." Dixie's modification was therefore limited to the traffic which it previously enjoyed prior to the advent of TOFC and MLRC.

On appeal the Court below held that the Commission's orders "are valid and lawful in all respects." (J.S. 10a)

ARGUMENT

The National Transportation Policy, 49 U.S.C. preceding §§ *1, 301, 901, and 1001,* provides:

> "It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions; . . . *all to the end of developing, coordinating, and preserving a national trans-*

portation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. *All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.*" (emphasis supplied)

Intervenor submits that the action of the Commission in modifying Intervenor's Certificate is a proper application of the Commission's responsibility under the National Transportation Policy. It has the effect of "preserving" the national transportation system in that it makes it possible for an established segment of the transportation system to remain in competition for the traffic which it had previously enjoyed over a great number of years. The appellants, on the other hand, seek to retain traffic only recently acquired as the result of the sudden and spectacular changes within the automotive transportation industry and destroy if need be this Intervenor by denying it continued access to its former market.

This appeal presents no substantial question which would warrant consideration by this Court. The Dixie certificate of authority was modified after Dixie had followed the procedure and met the criteria required by the Commission in its NATA decision. The modification to Dixie's certificate is limited in that it merely authorizes Dixie to participate in the remaining motor movement of its former Chrysler traffic and the restriction added to that modification clearly precludes Dixie from instituting a new carrier service in competition with appellants and other existing carriers.

Appellants contend (J.S. 8-10) that the Commission was required to treat Dixie's petition for modification as if it were an application for a new common carrier certificate, including a determination as to whether a new common car-

rier service is needed and required for public convenience and necessity. However, such a requirement was not the intention, we submit, of the Commission in its NATA decision. Dixie's petition to modify did not seek the right to offer a new transportation service to the general public in competition with existing carriers. "The need for the transportation by Dixie (of the Chrysler traffic from Detroit) had previously been established and Dixie had already been supplying that need" (J.S. 6a); the modification merely permits Dixie to continue to supply that need when the same traffic moves in coordinated motor-rail service. The appellants' contentions would have the Court place a construction on the NATA decision which would, in effect, nullify the basic findings and conclusions of the NATA case.

This intervenor respectfully submits that the abbreviated procedure whereby an existing motor carrier may petition for modification of its authority to enable it to remain in competition for traffic previously enjoyed, and only such traffic, is no radical departure, but on the contrary is more restrictive than previously required, adequately protects competing carriers in the secondary movement market, and is well within the discretionary authority of the Commission.

CONCLUSION

The action of the Commission in modifying this intervenor's existing authority represents a proper discharge of the Commission's responsibility of "preserving a national transportation system"; represents a proper exercise of discretionary authority of the Commission; and furnishes adequate safeguards to prevent damage or injury to the appellants from competition of the intervenor other than traffic previously enjoyed by Dixie Transport Company, which traffic is now enjoyed by the appellants as a windfall.

Since this appeal presents no issue warranting plenary consideration, the judgment of the Court below should be affirmed.

Respectfully submitted,

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